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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

STAN A. WALLIS,

Petitioner,

—v.—

COLONEL OLIVER E. O'KIER, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered February 19, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 491 F.2d 1323 and is set out in the Appendix, *infra*, pp. 1a-6a. The opinion of the United States District Court for the District of Kansas is unreported and is set out in the Appendix, *infra*, pp. 7a-11a. The order of the United States Court of Military Appeals, denying a petition for review, is reported at 44 Court Martial Reports 940, and is set out in the Appendix,

infra, p. 12a. The opinion of the United States Air Force Court of Military Review is reported at 44 Court Martial Reports 586 and is set out in the Appendix, *infra*, pp. 13a-23a.

Jurisdiction

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 19, 1974. By order dated May 9, 1974, Mr. Justice White extended the time for filing this petition to and including June 19, 1974, and by order dated June 12, 1974, further extended the time to and including June 29, 1974. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

Questions Presented

1. Whether a court-martial conviction was obtained in violation of the Fourth Amendment's requirement that search warrants be "supported by Oath or affirmation," where incriminating evidence was seized pursuant to an Authority to Search and Seize supported by no affidavit, sworn testimony, or documentation, but instead issued upon the basis of information provided to an Air Force Base Commander by a military law enforcement official during an unsworn, unrecorded, verbal briefing session?

2. Whether a court-martial conviction was obtained in violation of the Fourth Amendment's requirement that warrants be issued only by neutral, independent and competent magistrates, where a search warrant was issued by an official, the Commander of Mountain Home Air Force Base in Idaho, who had general responsibility for the law enforcement function and the maintenance of discipline

and order within the command, and who had initially approved and subsequently monitored the progress of the very criminal investigation which culminated in the request to him for a search warrant?

3. Whether these practices, which would clearly violate Fourth Amendment norms if employed by civilian law enforcement officials to secure a criminal conviction, can be justified on grounds of military necessity or discipline?

Constitutional Provisions, Statutes, and Regulations Involved

This case involves the Fourth Amendment to the Constitution, as well as Article I, Section 8, which provides:

> "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces;"

This case also involves Article 36(a), Uniform Code of Military Justice, 10 U.S.C. §836(a), which provides:

> The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Finally, the case involves paragraph 152, Manual for Courts-Martial, which is set out in the Appendix, *infra*, pp. 24a-28a.

Statement of the Case

In November 1970, the petitioner, Stan Wallis, was an enlisted man stationed at the Mountain Home Air Force Base in Idaho. On approximately November 9, 1970, the base Office of Special Investigation (OSI) received information that one Airman Pfaff had admitted using drugs and was willing to provide information to the OSI. Upon learning of this, Agent John Moulton, head of the OSI office, phoned the Base Commander, Colonel C. E. Y. Paxton, related to him the information which the OSI agents had received concerning Airman Pfaff, and sought authorization to pursue the investigation (R.T. 12-13).* According to Agent Moulton's subsequent testimony, the Base Commander "desired" that the agents "look into this matter" (R.T., App. Exh. 5, p. 20), and "suggested that [they] proceed to interview Pfaff at [their] convenience and determine what information he had in regards to the use of drugs by individuals on this base" (R.T. 13). Agent Moulton promised to keep Colonel Paxton "apprised of any developments" (R.T., App. Exh. 5, p. 20). The Agent's plan was to have his subordinates interview Pfaff, assess the information received, and then "consult the Base Commander, and the Staff Judge Advocate, in regards to whether or not the Base Commander would desire to investigate Pfaff or the individuals he implicated" (R.T., App. Exh. 5, p. 21).

* "R.T. ——" refers to the Record of Trial in the court-martial proceedings.

On November 12, 1970, two OSI agents conducted their initial interview with Pfaff. Agent Moulton was not present at the time, but the interviewing agents told him that Pfaff had told them the petitioner was one of several persons Pfaff suspected of involvement in the use and sale of drugs. Four days later, on November 16, Pfaff contacted the OSI agents and gave them a pill, later identified as containing LSD, which the petitioner had purportedly sold him (App., *infra*, p. 16a). The next day, Pfaff reportedly told one of the OSI agents that he had arranged to purchase various drugs from the petitioner the following Monday, November 23. Moulton was not present during that discussion. However, a day later, he again communicated certain facts about the investigation to Colonel Paxton (R.T. 31).

At 5:00 P.M. on November 23, Agent Moulton went to the Base Commander's office to brief Colonel Paxton and to obtain his approval on an Authority to Search and Seize —the functional equivalent of a search warrant—which Moulton had previously filled out and prepared (R.T. 20). The verbal briefing lasted approximately ten minutes (R.T. 42). Agent Moulton was not placed under oath or sworn as a witness during the session when he related information to the Base Commander (R.T. 45-46). The session was not recorded, nor did the Agent make any written record or notes of the information that he provided (R.T. 42-43). Similarly, none of the information which was related to the Commander was in affidavit or even written form (R.T. 45-46, 55-56). And none of the information which had been given to the OSI agents by Airman Pfaff or anyone else, and in turn related to the Base Commander, had ever been given under oath or in an affidavit or even reduced to an unsubscribed writing (R.T. 55-56).

As a consequence of this procedure, it is impossible to determine with certainty precisely what information was given to the Base Commander. The exact content of the OSI communications to the Commander had to be retrospectively reconstructed through the testimony of Agent Moulton.[1] However, at the outset of the briefing the "first thing" the Agent did "was to recapitulate the information [he] had furnished to [Colonel Paxton] on previous occasions when [he] had had an opportunity to discuss with him the particular investigation" (R.T. 53).[2]

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[1] Agent Moulton testified at an Article 32 preliminary examination, held on December 14, 1970, three weeks after the search, and again in a pre-trial deposition held on February 9, 1971, two months later. The Agent was unavailable to testify at the suppression hearing which immediately preceded the trial in late February. Instead, his previous testimony was read into the record. As a result, the military judge had no opportunity to witness the Agent's demeanor or assess his credibility in recollecting what information had purportedly been given to the Commander. The Base Commander was never called as a witness because, by the time the suppression hearing was held, he would have already reviewed the Agent's Article 32 testimony in his capacity as special court-martial convening authority. See Article 23, Uniform Code of Military Justice, 10 U.S.C., Section 823.

[2] As the Court of Military Review subsequently noted, the briefing agent "did not recall all the information he recited to the Commander." But, according to that court's review of the record, "[t]he agent was certain, however, that at least these facts were brought to the commander's attention:

1. Pfaff had admitted using marihuana in the past;
2. Pfaff identified specific base personnel as the users and possible sellers of drugs;
3. Pfaff identified a pill, which laboratory analysis verified as LSD, as having been obtained from the accused;
4. Pfaff stated he had received a cigarette, chemically identified as marihuana, from the accused's roommate;
5. Pfaff recited he had seen a bottle of pills in the accused's room. The accused indicated the pills were illegal drugs

At the conclusion of the briefing, the Base Commander authorized the OSI agents to conduct a search of the petitioner, his barracks room and any other person in the room. The Authority to Search and Seize (Air Force Form 1176) merely stated, in a preprinted portion, that the Commander was satisfied that there was probable cause to conduct the search:

> Having carefully considered the matters presented to me in support of that request, I am satisfied that there is probable cause to believe that property specified above is concealed on the (person) (premises) described. (App., *infra*, p. 29.)

The facts upon which this determination was made were not recited in the Authority; nor was there any contemporaneous indication of why the Commander believed that probable cause existed.[3]

The official who issued these equivalents of a search warrant, the Base Commander, did not have any specialized

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and offered to sell them to Pfaff in a transaction which was to occur on 23 November.

6. Pfaff had undergone medical treatment for the use of drugs and his physician believed him to be 'sane, rational, and honest.'" (App., *infra*, pp. 16a-17a.)

[3] At the court-martial, it was discovered, for the first time, that the Commander had also issued a *second* Authority authorizing a search of the petitioner's car (R.T. 102-03). The record clearly shows that the OSI agents had absolutely no reason to believe that drugs would be found in the petitioner's car, nor was the Commander presented with any such information (R.T. 104-06). This second Authority was not used, presumably because the agents' search of the petitioner and his room proved successful, and its very existence came to light during the trial only as a result of a mistake in the marking of exhibits for identification (R.T. 102-03).

legal training (R. 4).[4] Nor was there any indication that, prior to authorizing the search, he had sought advice from any person knowledgeable in the standards of probable cause. As Base Commander responsible for the security of his installation, he had authorized the initial investigation and had been briefed on its status several times prior to acting on the formal request for the Authority to Search.

Armed with the Authority issued by the Base Commander, and having received a pre-arranged signal from the informant as he left the room indicating that a sale of drugs had just occurred, the OSI agents proceeded to execute the Authority by entering the petitioner's room, with a pass key, without knocking or announcing their entry (R.T. 64-72). They searched the petitioner, the other occupants, and the room itself, seizing ten marked bills, various pills, a wool shirt with marijuana residue, two pipe bowls and a coat with marijuana, and various of the petitioner's letters (R.T. 182-87, 264-66, 269-71).

The petitioner was charged with three specifications under Article 92 of the Uniform Code of Military Justice (10 U.S.C. Section 892) (possession and sale of LSD prohibited by certain Air Force regulations) and one specification under Article 134, Uniform Code of Military Justice, 10 U.S.C. Section 934 (possession of marijuana). Evidence obtained during the search was introduced at trial and was central to the prosecution's case (R. 94-95, 102-03). Defense objections to the admissibility of this evidence—that the search was not based on probable cause, that probable cause was not supported by oath or affirmation, that the

[4] "R. ——" refers to the record on appeal in the Tenth Circuit.

Base Commander did not act as a neutral magistrate, and that the manner of entry was unconstitutional—were overruled by the military judge without opinion (R.T. 118-123, 132).

At the conclusion of the trial, the petitioner was found guilty on all charges, and on February 26, 1971 was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for four years, and reduction in rank to airman basic.

The petitioner appealed his conviction to the United States Air Force Court of Military Review which affirmed the conviction and sentence. *United States* v. *Wallis,* ACM 20901, 44 CMR 586 (1971). That Court took note of the petitioner's arguments that authorizations to search should be based upon written affidavits or sworn testimony and should not be issued by Base Commanders, but held that those claims were foreclosed by decisions of the United States Court of Military Appeals (App., *infra,* pp. 12a-16a). However, the Court of Military Appeals refused to review the petitioner's conviction or consider these issues. *United States* v. *Wallis,* —— USCMA —— 44 CMR 940 (1971) (App., *infra,* p. 12a). On January 17, 1972, the petitioner's confinement at Leavenworth Disciplinary Barracks was ordered (App., *infra,* p. 8a).

The petitioner then filed the instant habeas corpus application in the United States District Court for the District of Kansas. In that application the petitioner contended that the Air Force system for authorizing searches, utilized in his case, violated the Fourth Amendment because (1) it failed to require that probable cause be "supported by Oath or affirmation," but instead allowed the

equivalent of search warrants to issue upon unsworn, unrecorded, verbal information, and (2) it allowed such warrants to be issued by base commanders who are not independent, neutral magistrates.[5] The District Court noted these contentions, but held that because they had been presented to the military tribunals, and given "full and fair consideration" there, the District Court lacked "jurisdiction to intervene or to review the merits of this case" (App., *infra,* pp. 8a-9a).

On appeal, the United States Court of Appeals for the Tenth Circuit did reach the merits. It ruled that military search warrants need not conform to the oath or affirmation requirement of the Fourth Amendment because, "although this was probably not such a case, many situations have existed and will exist in military commands where the formalizing of the probable cause by the affixing of a seal to a paper writing would be impracticable or impossible" (App., *infra,* p. 4a). It further held that such warrants could be issued by the Base Commander, notwithstanding his general responsibility "for the maintenance of order and discipline within his command" and his prior involvement in this particular investigation (App., *infra,* p. 5a).

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[5] The petitioner in no way conceded that the information presented by the OSI official to the Base Commander was sufficient or adequate to support a conclusion that probable cause to search existed. Rather, the petitioner simply did not raise the issue of whether the information which the OSI official subsequently stated that he gave the Base Commander would have supported a finding of probable cause. See footnote 2 *supra.*

Reasons for Granting the Writ

Introduction

Certiorari should be granted because this case presents an important question which should be resolved by this Court, namely, whether and to what extent military criminal justice practices must conform to the Fourth Amendment.

Petitioner was convicted by court-martial on the basis of evidence seized from his person and barracks room—his military "home"—in a search initiated by procedures clearly violative of Fourth Amendment requirements. Had those same procedures been employed by civilian law enforcement officials in the Idaho communities surrounding the Air Force Base where the petitioner was stationed, this case would never have survived a motion to suppress. Since the Fourth Amendment violations are so apparent, the case presents a clear opportunity to consider whether the conditions and requirements of military life can possibly justify a different result. See *Parker* v. *Levy*, —— U.S. ——, 42 U.S. Law Week 4979 (June 19, 1974).

The Tenth Circuit thought that a different result could be justified by reference to the Constitution's grant of congressional authority "to make rules for the Government and regulation of land and naval Forces," pursuant to which the Congress has provided that "the procedure, including modes of proof, in cases before courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence" used in federal courts. 10 U.S.C. Section 836(a). But as this Court has recently noted: "It is clear, of course, that no Act of Congress

can authorize a violation of the Constitution," *United States* v. *Almeida-Sanchez,* —— U.S. ——, 37 L. ed.2d 596, 602 (1973). Similarly, the Tenth Circuit relied on the fact that the Manual for Courts-Martial, ¶152, promulgated as an administrative regulation by the President pursuant to 10 U.S.C. Section 836(a), does not require that the authorization for military searches be based upon "Oath or affirmation" or authorized by neutral and independent magistrates. But this Court has also rejected the doctrine that the protections of the Fourth Amendment can be supplanted by executive fiat. *United States* v. *United States District Court,* 407 U.S. 297 (1972). The ruling below is thus in conflict with these decisions holding that Fourth Amendment guarantees cannot be voided by legislative enactment or executive regulation.

Nor can that ruling be sustained on the theory that differences between military and civilian life justified the violation of the petitioner's Fourth Amendment rights. See, *Parker* v. *Levy, supra.* No considerations of military necessity support the practices employed in this case. Indeed, the Court of Military Appeals has imposed most of the Fourth Amendment's safeguards upon military justice practices—requiring the existence of probable cause as a precondition to authorizing a search, requiring that probable cause be based only on facts presented to the official who authorizes the search, limiting the power to search to the items specified in the authorization, and requiring warrants in all but exigent circumstances. See, *e.g., United States* v. *Hartsook,* 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *United States* v. *Sam,* 22 U.S.C.M.A. 124, 46 C.M.R. 124 (1973); see generally, McNeill, *Recent Trends in Search and Seizure,* 54 Mil. L. Rev. 83 (1971). Moreover, the Court

of Military Appeals has consistently criticized the practices used in this case, has urged the military to alter them, but has stopped short of invalidating such practices. See, *e.g., United States* v. *Sam, supra; United States* v. *Penman,* 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966). Thus, the military courts having defaulted here in their obligation "to protect a person from a violation of his constitutional rights," *Burns* v. *Wilson,* 346 U.S. 137, 142 (1953), it is incumbent upon this Court to remedy the situation.[6]

A. *The "Oath or affirmation" requirement.*

The Fourth Amendment provides: " . . . no warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . . " As the Court noted forty years ago: "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation." *Nathanson* v. *United States,* 290 U.S. 41, 47 (1933). In all jurisdictions in the country, except for the military, this requirement is met by having those facts and circumstances which serve as the basis for a determination of probable cause presented to a judge or magistrate either under oath or in the form of a written affidavit. See generally, 47 Am. Jur.,

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[6] *Parker* v. *Levy, supra,* does not compel a contrary conclusion. There, the Court dealt with First and Fifth Amendment vagueness and overbreadth challenges to provisions which were viewed as central to the needs of military discipline. In that context, a majority ruled that civilian standards of notice and precision were not necessarily applicable in assessing provisions deemed necessary to fulfilling the military mission. Here, by contrast, the challenge is to procedures violative of Fourth Amendment safeguards, in the context of a prosecution for crimes which are by no means uniquely military in nature. See, *Committee for G.I. Rights* v. *Schlessinger,* 370 F. Supp. 934 (D.D.C. 1973), *app. pending.*

Searches and Seizures, 27, 519. For example, Rule 41(c) of the Federal Rules of Criminal Procedure requires the use of affidavits and additionally provides for the examination of witnesses under oath.

Indeed, the requirement of an affidavit or sworn testimony is so well accepted, that there are few cases where the issue even arises. On the few occasions when it has, federal courts have quickly invalidated warrants issued on the basis of information not presented in the form of an affidavit or under oath. See, *e.g., Dow* v. *Laird,* 389 F.2d 882, 883 (10th Cir. 1968) ("There can be no doubt whatever that the search warrant served on the plaintiff was illegal, if for no other reason, because it was not 'supported by Oath or affirmation. . . .'"); *Frazier* v. *Roberts,* 441 F.2d 1224, 1227 (8th Cir. 1971) ("The nearly unanimous view is that the Fourth Amendment requires that only information related to the magistrate on Oath or affirmation is competent upon which to base a finding of probable cause; . . . unsworn oral statements may not form a basis for that decision"). While there is some dispute over reliance on sworn oral evidence to bolster a defective affidavit, all courts agree that there must be information under oath at some point:

> The only clear cut unanimity that is ascertainable . . . is that . . . any information relied upon to establish probable cause must be, in the words of the Fourth Amendment, "upon probable cause, supported by Oath or affirmation." *Tabasco* v. *Barton,* 472 F.2d 871, 874 (6th Cir. 1972), *cert. denied,* 412 U.S. 908 (1973); see also, *United States ex rel. Gaugler* v. *Brierly,* 477 F.2d 516 (3rd Cir. 1973).

Indeed, the decision below is in direct conflict with a ruling of the Court of Claims which invalidated an Air Force search authorized by the same procedures employed against this petitioner. *Saylor* v. *United States,* 374 F.2d 894 (Ct. Cl. 1967).

Nor is the oath requirement an "empty formality." *Dow* v. *Laird, supra,* 389 F.2d at 883. Rather, it embodies the sound constitutional policy that information given under oath is presumed to be more trustworthy and reliable. See, *Spinelli* v. *United States,* 393 U.S. 410, 423 (1969) (concurring opinion of Mr. Justice White). Similarly, the oath requirement facilitates application of the rule that a reviewing court, in assessing a magistrate's finding of probable cause, may consider only the information brought to the magistrate's attention—a rule fully applicable in military proceedings. See, *e.g., United States* v. *Hartsook,* 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965). On several occasions, even the Court of Military Appeals has criticized the use of verbal briefing procedures to authorize searches, because they result in the awkward and uncertain post-search reconstruction of the facts presented to the Commander. See, *United States* v. *Hartsook, supra; United States* v. *Penman, supra; United States* v. *McFarland,* 19 U.S.C.M.A. 356, 358, n. 1, 41 C.M.R. 356, 358, n. 1 (1970); *United States* v. *Sam, supra.*

In short, the verbal briefing procedure used here violated the Fourth Amendment and was not justified by any concepts of military necessity.[7]

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[7] The Army has at least authorized an alternative system whereby search warrants can be issued by military judges acting only on the basis of affidavits. AR 27-10, §14 (Sept. 7, 1971) (R. 55-57); see generally, McNeill, *Recent Trends in Search and Seizure,* 54 Mil. L. Rev. 83, 94-102 (1971).

The Air Force, however, has persistently refuse to adopt such procedures. At one point, when certain Air Force commands ap-

F. ***The "neutral and detached" magistrate requirement.***

The constitutional problems raised by the absence of an oath procedure to support the warrant are compounded by allowing Base Commanders to issue such warrants. The warrant procedure, which is at "the very heart" of the Fourth Amendment, *United States* v. *United States District Court,* 407 U.S. 297, 316 (1972), is designed to insure "that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police . . . " *Wong Son* v. *United States,* 371 U.S. 471, 481-82 (1963); *McDonald* v. *United States,* 335 U.S. 451, 455 (1948). "Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate' . . . . " *United States* v. *United States District Court, supra,* 407 U.S. at 316. While the military courts have characterized the commanding officer as the equivalent of a Federal magistrate, *United States* v. *Hartsook,* 15 USCMA 291, 294, 35 CMR 263, 266 (1965), such officials in general, and the Commander in this case, meet none of the constitutional qualifications of a magistrate which this Court has identified.

First, a neutral and independent magistrate must be institutionally independent of the law enforcement function; there must be "no connection with any law enforcement

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parently began to require sworn affidavits, the practice was promptly squelched in a message from The Judge Advocate, the same month as the petitioner's court-martial:

> The desirability of using an affidavit in support of a request for Authorization to Search has been thoroughly considered by TJAG of the AF. He has determined that AF Form 1176, Authority to Search and Seize, will continue to be the only repeat only form used for this purpose. No other form or affidavit is authorized. The commands that have authorized or are requesting the use of additional forms and affidavits prior to granting an authorization to search will be informed that these additional requirements are contrary to current AF policy and should be discontinued immediately (R. 42).

activity or authority which would distort the independent judgment the Fourth Amendment requires." *Shadwick* v. *City of Tampa*, 407 U.S. 345, 350-51 (1972). In the military, however, "[t]he commanding officer of a unit [is] charged . . . with the maintenance of discipline over his command and the responsibility for United States property under his control. . . ." *United States* v. *Murray*, 12 USCMA 434, 436, 31 CMR 20, 22 (1961).[8] As demonstrated here, the Commander has the authority to initiate an investigation at any time, and "commanders are themselves not infrequently investigating the alleged crime at the same time they authorize the search." McNeill, *Recent Trends in Search and Seizure*, 54 Mil. L. Rev. 83, 96 (1971). Once the investigation has resulted in the filing of charges, the commander will supervise much of the processing of those charges, including the important decision as to convening a special or summary court-martial. See, 10 U.S.C. Sections 823, 824, 827, 828, 834. Given these institutional responsibilities, the commander cannot possess the detachment and neutrality required by the Fourth Amendment. Indeed, even the Court of Military Appeals, though persistently equating commanders with Federal magistrates, has noted that "common sense leads us to appreciate the difficulty he may tend to experience in viewing his decision with a magistrate's neutrality and detachment." *United States* v. *Sam*, 22 USCMA 124, 46 CMR 124, 127 (1973).

Second, the person issuing the warrant must have had no involvement in the very investigation which culminated

[8] Indeed, the very regulation which the petitioner was charged with violating imposed specific investigatory responsibilities upon installation commanders to report instances of drug abuse to the OSI and to maintain liaison with civilian law enforcement authorities. See, Air Force Regulation 35-6 ("Illegal or improper use of drugs") (Aug. 1969).

in the request for a warrant. *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). In *Coolidge,* the defective warrant was issued by the State Attorney General who had taken charge of the police investigation of a murder and who later served as chief prosecutor at the trial. He issued the warrant at the end of an informal meeting during which police officials reviewed the results of the investigation, 403 U.S. at 446-47. The similarities here are striking. The Base Commander initially authorized the investigation, was continually kept informed of its developments, and was informally briefed on its results immediately prior to issuing the warrant. Like the Attorney General in *Coolidge,* the base commander here "was not the neutral and detached magistrate required by the Constitution. . . . " *Id.,* at 453.

Finally, in addition to the requirements of institutional and particular neutrality and detachment, the magistrate must also be "capable of determining whether probable cause exists for the requested arrest or search." *Shadwick* v. *City of Tampa, supra,* 407 U.S. at 350. Here, the petitioner alleged, without contradiction, that the Base Commander had no legal training in the standards of probable cause and sought no advice from anyone with such training (R. 4).

The principles which should have controlled this case are clear: "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their task." *United States* v. *United States District Court, supra,* 407

U.S. at 317. If Presidents and Attorney Generals, claiming the interests of national security, cannot by-pass the Fourth Amendment, surely military commanders, seeking to punish drug abuse, should enjoy no greater authority.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 29, 1974

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANUARY 1974 TERM

No. 73-1414

[Filed February 19, 1974]

STAN A. WALLIS,

Petitioner-Appellant,

—v.—

COLONEL OLIVER E. O'KIER, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

(L-2392)

JOEL M. GORA (Melvin L. Wulf, Joel M. Gora, Nicholas Waranoff, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York, David Addlestone, Military Law Project ACLU, 410 First Street, S. E., Washington, D. C., and Scott Jarvis, 600 New England Building, Topeka, Kansas, on the brief), *for Petitioner-Appellant.*

FRANKLIN A. LUNA (Robert J. Roth, United States Attorney, Bruce D. Miller, Assistant United States Attorney, Franklin A. Luna, Major, USAF, Office of the Judge Advocate General, United States Air Force, on the brief), *for Respondent-Appellee.*

Before:

LEWIS, *Chief Judge,* and
JONES* and MCWILLIAMS, *Circuit Judges*

JONES, *Circuit Judge*:

The factual situation from which this appeal arises may be stated briefly. The appellant, Stan A. Wallis, was an Airman in the United States Air Force. He was stationed at Mountain Home Air Base, Idaho. Agents of the Office of Special Investigation at the Base had information that Wallis was trafficking in contraband drugs. The information was given orally to the Colonel in command of the Base. The Colonel issued a special warrant authorizing or purporting to authorize the search of the effects of Wallis in his barracks room and automobile. The search was made and prohibited drugs were found. Four charges, all involving possession and sale of illicit drugs, were made. Wallis was tried before an Air Force General Court-Martial and convicted on all of the charges. A single sentence of dishonorable discharge, four years imprisonment at hard labor, loss of grade and forfeiture of pay was imposed. His sentence was reviewed and affirmed by the Staff Judge Advocate of the General Court-Martial Convening Authority, by the General Court-Martial Convening Authority

* Of the Fifth Circuit, sitting by designation.

and by the United States Air Force Court of Military Review. The conviction and sentence was affirmed by all of these. The Court of Military Appeals denied a petition for review. The term of imprisonment was commuted from four to three years. He was confined in the United States Disciplinary Barracks at Fort Leavenworth, Kansas, and while so confined he petitioned the United States District Court for the District of Kansas for the issuance of a writ of habeas corpus. The district court entered an order denying the petition and from that order Wallis has appealed. After the judgment of the district court and prior to the filing of the notice of appeal, Wallis had completed serving his sentence and was released from custody.

The district court held that the contentions of Wallis had been given full and fair consideration by each military tribunal to which they were presented and accordingly, the court concluded it lacked jurisdiction to intervene or to review the merits of the case. After deciding that it was without jurisdiction, the court proceeded to determine that the procedures followed in the issuance and execution of the search warrant were valid and proper, and that Wallis was not denied any right accorded him by the Federal Constitution.

In that document it is provided that,

> "The Congress shall have power . . . to make rules for the Government and regulation of land and naval forces." U.S. Const., Art. I, §8.

The Congress has provided that,

> "The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be pre-

scribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C.A. §836(a).

In the exercise of the granted powers, the President promulgated the Manual for Courts-Martial. In this extensive Manual it is set forth that a search may be made pursuant to a warrant issued by the commanding officer of a military installation upon probable cause. Manual for Courts-Martial, ¶152. The manual does not provide for the probable cause to be supported by oath or affirmation as does the Fourth Amendment to the Constitution. There seems to be no doubt but that an express provision of the military law that probable cause could be shown by oral statements would be valid. Any draftsman of a rule providing for probable cause as an incident to the issuance of a search warrant would be consciously aware of the Fourth Amendment provision. It is apparent that the omission of a reference to oath or affirmation was deliberate and intentional. There are reasons for such an inference. Although this was probably not such a case, many situations have existed and will exist in military commands where the formalizing of the probable cause by the affixing of a seal to a paper writing would be impracticable or impossible. Such a construction has been placed upon the provision by the military courts. The search made pursuant to a warrant issued, upon probable cause not supported by oath or affirmation, by the commanding officer of the military installation, where the search is to be made of property in the possession or under the control of a

person in the command of the officer issuing the warrant, as in the case here present, is a valid search.

It is said on behalf of Wallis that a search warrant should be issued by one who is independent and neutral and that the Commanding Officer is not within this category. In support of this doctrine, Wallis relies upon Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564, reh. den. 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120, and Shadwick v. City of Tampa, 407 U.S. 345, 92 S. Ct. 2119, 32 L. Ed. 2d 783. These decisions hold that police officers and prosecutors do not have that independence and neutrality which are necessary in the exercise of the issuance of search warrants. It has not been shown, and the Court will not assume, that the Commanding Officer of a military installation is to be classified as a prosecutor or a policeman. We think he is neither. He is of the description given him by his title—the Commanding Officer of the personnel within his command and of the property committed to his control. To be sure, he is responsible for the maintenance of order and discipline within his command. This does not mean that he is partial, prejudiced and biased. There is no reason to suppose that he would be less willing than a magistrate that there be a fair and just administration of the law.

We are urged by the Government to hold that this is a case where military tribunals have given full and fair consideration to the issue presented and that, since this has been done, the district court and this Court are without jurisdiction to review the merits of the cause. This is an overstatement of principle. Wallis asserted in his habeas corpus petition that he was being deprived of his liberty in violation of a right guaranteed to him by the United States Constitution. Where such a constitutional

right is asserted and where it is claimed that the petitioner for the Great Writ is in custody by reason of such deprivation, the constitutional courts of the United States have the power and are under the duty to make inquiry. Kennedy v. Commandant, U. S. Disciplinary Barracks, 10th Cir., 1967, 377 F.2d 339.

Deciding as we do that the search warrant was valid, the judgment of the district court will be and it is AFFIRMED.

Opinion of the United States District Court for the District of Kansas

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
Civil Action No. L-2392
[Filed April 2, 1973]

STAN A. WALLIS,

Petitioner,

—v.—

COLONEL OLIVER E. O'KIER, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas,

Respondent.

MEMORANDUM AND ORDER

The petitioner heretofore filed with this court his application for writ of habeas corpus, and a Rule to Show Cause was issued under order of this court. Respondent has filed an Answer and Return, together with numerous attachments; and petitioner has filed his Traverse. Upon examination of these documents, the court makes the following findings and order.

It appears from the application that petitioner is presently in the custody of the Commandant of the United States Disciplinary Barracks, Fort Leavenworth, Kansas, by or under color of authority of the United States, by virtue of a conviction following General Court-Martial,

convened at Mountain Home Air Force Base, Idaho. The accused was charged with three offenses of violating a lawful general regulation (AFR 35-6, Illegal or Improper Use of Drugs) by selling lysergic acid diethylamide (LSD) on two occasions and possessing it on another, in violation of Article 92, Uniform Code of Military Justice; and one offense of wrongfully possessing marihuana contrary to Article 134 of the Code. Although petitioner pleaded not guilty to all charges and specifications, he was convicted by a military jury and sentenced to a dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for four years, and reduction to airman basic. Petitioner appealed his conviction to the United States Air Force Court of Military Review which, on September 30, 1971, affirmed the conviction and sentence. [*United States* v. *Wallis,* ACM 20901, 44 CMR 586 (1971).] Thereafter, the petitioner filed a petition for review which was denied by the United States Court of Military Appeals on December 20, 1971. [*United States* v. *Wallis,* —— USCMA ——, 44 CMR 940 (1971).] By order dated January 17, 1972, the present confinement was directed. The court concludes that petitioner's remedies within the military system have been adequately exhausted. [*Noyd* v. *Bond,* 395 U.S. 683, 23 L. Ed. 2d 631, 89 S.C. 1876 (1971).]

The gist of petitioner's complaint that he is being held in custody unlawfully, is based upon two Fourth Amendment arguments: (1) that the search warrants employed in this case were not issued upon probable cause "supported by oath or affirmation"; and (2) that such warrants were not issued by an independent and neutral magistrate. Thus, petitioner's attack is aimed at the procedures by which the finding of "probable cause" was made for the issuance of these particular search warrants.

We must first determine the extent to which we may collaterally review a court-martial conviction. In *Burns* v. *Wilson*, 346 U.S. 137, 97 L. Ed. 1508, 73 S.C. 1045 (1953), the Supreme Court clearly established the rule that the civil courts are to determine whether the military has given full and fair consideration to each of the petitioner's constitutional claims. In military habeas there can be no question, however, that the civil courts have jurisdiction to determine whether the petitioner was denied any basic right guaranteed to him by the Constitution. [*Dixon* v. *United States*, 237 F.2d 509 (10th Cir. 1956).]

While there apparently exists at least some philosophical disagreement over the proper standard of review to be employed by a federal district court in military habeas, on the whole the courts have shown a desire to keep the scope of review from expanding. This is expressly the rule in the Tenth Circuit. See *King* v. *Moseley*, 430 F.2d 732 (10th Cir. 1970); *Kennedy* v. *Commandant*, 377 F.2d 339 (10th Cir. 1967); *Palomera* v. *Taylor*, 344 F.2d 937 (10th Cir. 1965). The rationale behind this standard is no more than the realization that the military authorities have expertise and specialized knowledge in matters of military affairs; that the military must maintain a certain critical level of discipline within their ranks; and that Congress and the Constitution have granted specific and autonomous jurisdiction to the military.

Civil courts may intervene when the military tribunal has no jurisdiction of the person or of the crime or when the actual fact-finding process itself has been invaded by a gross lack of due process. See *e.g. Sweet* v. *Taylor*, 178 F. Supp. 458 (D.C. Kan. 1959); *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965).

Petitioner, however, contends that inasmuch as his arguments are "directed not to the particular determination

of probable cause, but to the procedures pursuant to which that particular finding was made," that we may adjudicate the merits of his constitutional claims even though the military has already given the matter full and fair consideration. This is not the law, and furthermore, we are not presented with circumstances compelling our equitable intervention.

As stated earlier, petitioner's alleged errors were presented and considered at each level of review. The military judge expressly rejected them. The convening authority referred the record to the Staff Judge Advocate for review. The findings and sentence were approved by the convening authority and the record was forwarded to the Judge Advocate General of the Air Force for review by the Air Force Court of Military Review, which found the findings of guilty correct in both law and fact. Petition for review by the United States Court of Military Appeals was denied. This court concludes that the errors alleged by the petitioner have been given full and fair consideration by each military level to which they were presented. Accordingly, we conclude that we lack jurisdiction to intervene or to review the merits of this case.

Petitioner would have us hold that a military commander may not authorize a search within a military installation upon probable cause established by the oral, unsworn representations of military investigators, in accordance with existing procedures established pursuant to Congressional authority. The military or Congress, but certainly not the courts, should be the ones to fashion the remedy requested by the petitioner.

The court concludes that the petitioner was denied no right granted him by the Federal Constitution; that his conviction and the resulting sentence were valid; and that

the petitioner is legally in the custody of the respondent and is entitled to no relief.

IT IS ORDERED that this action be dismissed and that judgment be entered against the petitioner for costs. The clerk is directed to transmit copies of this Memorandum and Order to all interested parties.

Dated at Kansas City, Kansas, this 30th day of April, 1973.

EARL E. O'CONNOR
United States District Judge

Order of the United States Court of Military Appeals

UNITED STATES COURT OF
MILITARY APPEALS

No. 24,821

[Filed December 20, 1971]

UNITED STATES,

Appellee,

—v.—

Airman STAN A. WALLIS
(FR 549-62-6524),

Appellant.

ORDER DENYING PETITION FOR REVIEW

On consideration of the Petition for Grant of Review of the decision of the Court of Military Review in case No. ACM 20901 of the United States Air Force, it is, by the Court, this 20th day of December 1971,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

cc: The Judge Advocate General
Col. George M. Wilson
Capt. Robert L. Bridge
Appellate Defense Counsel
Col. Henry R. Lockington
Appellate Government Counsel

Opinion of the United States Air Force Court of Military Review

CORRECTED PAGE: ACM 20901, WALLIS

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

UNITED STATES,

—v.—

Airman STAN A. WALLIS, FR 549-62-6524,
10th Tactical Reconnaissance Squadron.

TWELFTH AIR FORCE (TAC)

Sentence adjudged 26 February 1971 by GCM convened at Mountain Home Air Force Base, Idaho.

Military Judge: Allan C. Smith.

Approved sentence: *Dishonorable* discharge, total forfeitures, confinement at hard labor for four (4) years, and reduction to airman basic.

30 September 1971

Appellate Counsel for the Accused:

COLONEL BERTRAM JACOBSON, LIEUTENANT COLONEL NORMAN L. PAUL, and CAPTAIN ROBERT L. BRIDGE. Captain Gary C. Aker filed a brief on behalf of the accused. Melvin L. Wulf and Joel M. Gora,

American Civil Liberties Union, New York, New York, filed a brief amicus curiae on behalf of the accused.

Appellate Counsel for the United States:

COLONEL JAMES M. BUMGARNER and COLONEL HENRY R. LOCKINGTON.

Before:

AMERY, LETARTE, HALICKI, FRIEDMAN and CHOVANEC,
Appellate Military Judges

DECISION

FRIEDMAN, *Judge*:

The accused was charged with three offenses of violating a lawful general regulation (AFR 35-6, Illegal or Improper Use of Drugs, paragraph 5a, 6 August 1969) by selling lysergic acid diethylamide (LSD) on two occasions and possessing it on another, in violation of Article 92, Uniform Code of Military Justice (Charge I and its specifications); and one offense of wrongfully possessing marihuana contrary to Article 134 of the Code (Charge II and its specification). He pleaded not guilty to all offenses but was convicted as charged and sentenced to dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for four years, and reduction to airman basic.

Appellate defense counsel invite our attention to trial defense counsel's assertion of errors and the amicus curiae brief of the American Civil Liberties Union filed with the permission of this Court.

The accused was found with incriminating property in his possession during a search authorized by his base commander. The commander authorized the search upon the oral, unsworn representations of an OSI investigator. The amicus brief urges

> "... this Court (1) to require that all authorizations to search be issued by military judges, or by the judges or commissioners named in Rule 41(a) of the Federal Rules of Criminal Procedure; and/or (2) to require the use of written affidavits before a search can be authorized, in accordance with federal civilian practice under Rule 41(c) of the Federal Rules of Criminal Procedure."

Paralleling the second part of this request, trial defense counsel contends that factual representations to the commander, verbal as well as written, must be made under oath or affirmation. Both trial defense counsel and our amicus argue, variously, that all these practices are either dictated by the Fourth Amendment to the United States Constitution or are at least consistent with it. They ask that we now make these practices a requirement of military law.

The arguments are stated most articulately but they tread familiar and adverse ground. Of course, Rule 41 has no application to military law and, equally certain, a commander has the power to authorize a search. Manual for Courts-Martial, 1969 (Revised edition) paragraph 152; United States v. Hartsook, 15 USCMA 291, 35 CMR 263 (1965). It is true that the United States Court of Military Appeals has stressed the value both at trial and on appellate review of a written application for authorization to search. United States v. Hartsook, supra. However, that

Court has expressly recognized that military law does not require such a document. United States v. McFarland, 19 USCMA 356, 41 CMR 356 (1970); United States v. Penman, 16 USCMA 67, 36 CMR 223 (1966). Nor is there any requirement that the factual representation be made under oath or affirmation. United States v. Penman, supra; United States v. King, 36 CMR 929 (AFBR 1966) pet. denied, 36 CMR 541. In a nutshell, then, we are asked to rule contrary to the explicit holdings of the Court of Military Appeals. This we may not do. United States v. Armbruster, 11 USCMA 596, 29 CMR 412 (1960).

At trial, the defense contended the search was improper because the commander authorized it without probable cause. The evidence shows that in early November 1970, one Airman Pfaff, assigned to the same installation as the accused, told his (Pfaff's) first sergeant that he had used marihuana and knew others who were taking drugs. The base commander was apprised accordingly and he directed that an OSI investigation commence. On 12 November, Pfaff was interviewed and indicated he would cooperate in the investigation. Four days later, Pfaff turned over to the OSI a pill which he said he obtained from the accused. Chemical analysis established that the pill contained LSD. Pfaff also had his first sergeant deliver to the OSI a marihuana cigarette which Pfaff received from the accused's roommate. While in the accused's room on 16 November, Pfaff observed a large number of pills, which the accused identified as drugs, in the accused's immediate possession. The accused offered to sell drugs to Pfaff and, with OSI knowledge and interest, Pfaff agreed to buy them. The transaction was to occur on 23 November and a short time before the sale the OSI again briefed the base commander. At trial, the briefing OSI agent did

not recall all the information he recited to the commander. The agent was certain, however, that at least these facts were brought to the commander's attention:

1. Pfaff had admitted using marihuana in the past;
2. Pfaff identified specific base personnel as the users and possible sellers of drugs;
3. Pfaff identified a pill, which laboratory analysis verified as LSD, as having been obtained from the accused;
4. Pfaff stated he had received a cigarette, chemically identified as marihuana, from the accused's roommate;
5. Pfaff recited he had seen a bottle of pills in the accused's room. The accused indicated the pills were illegal drugs and offered to sell them to Pfaff in a transaction which was to occur on 23 November.
6. Pfaff had undergone medical treatment for the use of drugs and his physician believed him to be "sane, rational, and honest".

Following the briefing, the commander authorized the search of the accused's person and room.

Military law requires that a commander who authorizes a search must have knowledge of facts sufficient to establish probable cause. Manual for Courts-Martial, supra, paragraph 152; United States v. Ness, 13 USCMA 18, 32 CMR 18 (1962). Probable cause exists when the facts would:

> "... lead a prudent person to conclude that contraband or evidence of a crime is in possession of the

> individual, or is on the premises, to be searched. The facts in support of the application to search need not be predicated upon the personal knowledge of the applicant, but when the application relies upon hearsay it must present a 'substantial basis' for crediting the hearsay. See United States v. Davenport, 14 USCMA 152, 157, 33 CMR 364 (1963)." United States v. McFarland, 19 USCMA 356, 41 CMR 356, 359 (1970).

Pfaff's statement, if credible, would have justified a man of prudence to believe that the accused was in possession of prohibited drugs. Thus, the crucial factor was Pfaff's reliability. United States v. Davenport, supra. We have no doubt the commander had a "substantial basis" for crediting Pfaff's assertions. He was aware that Pfaff had admitted prior misconduct of a similar nature and these admissions were significant in judging his credibility. United States v. Clifford, 19 USCMA 391, 41 CMR 391 (1970); United States v. Goldman, 18 USCMA 389, 40 CMR 101 (1969). He also knew that Pfaff had demonstrated his reliability by turning over prohibited drugs to investigative officials. Finally, the commander was advised that the physician who was treating Pfaff for misuse of drugs, the very essence of the matter under investigation, believed him to be honest. In these circumstances, he was entirely warranted in concluding that Pfaff was reliable. We are certain the commander had probable cause to authorize the search.

Trial defense counsel also urges that the fruits of the search were inadmissible because the very manner of the investigator's entry into the accused's room was illegal. Using a passkey, the investigators made an unannounced entrance. They identified themselves and their purpose to

the accused and his roommate only after they were inside. Counsel argues this unannounced entry violated the accused's Fourth Amendment rights and a Federal statute, 18 USC 3109 (1970). This statute provides:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." [1]

We perceive no reason for lengthy discussion of the statute. Its own terms establish that it is directed to Federal civil officers and has no application to the military. Of course, military law makes no provision for the issuance of a warrant to search. Manual for Courts-Martial, supra, paragraph 152; United States v. Hartsook, supra. And it would be inappropriate for us to extend the statute to cases outside its purview. United States v. Baker, 18 USCMA 504, 40 CMR 216 (1969); United States v. Blair, 10 USCMA 161, 27 CMR 235 (1959). However, the problem posed by counsel does not end here for in Ker v. California, 374 US 23 (1963), the United States Supreme Court recognized a constitutional requirement that forceable entry to effect a search is to be preceded by the announcement of identity and purpose by law enforcement officers. See also State v. Young, 76 Wash 2d 212, 455 P2d 595 (1969). The Supreme Court's recognition of this requirement does not, per se, render the doctrine applicable to military searches. The *Ker* case involved civil officers conducting a search pur-

[1] Civil cases have held that use of a passkey constitutes a forceable breaking within the purview of the statute. See Sabbath v. United States, 391 US 585 (1968).

suant to a civil arrest.[2] And "[t]ime and circumstance may require a [constitutional] balance to be struck at one point in the civilian community, but at another in the military." United States v. Kazmierczak, 16 USCMA 594, 37 CMR 214 (1967).

Where the balance falls as to the doctrine in question need not detain us here for this accused's rights were not violated under any standard. *Ker* and other authorities establish that the requirement for announcement prior to entry is not absolute. Announcement is not necessary when to do so would be dangerous. See Sabbath v. United States, 391 US 585 (1968); Gilbert v. United States, 366 F2d 923 (9th Cir. 1966), cert denied, 388 US 922 (1967). Nor is it required where there is good reason to believe that the premises contain illegal drugs which could be quickly and easily destroyed. United States v. Ker, supra; United States v. Burruss, 306 F Supp 915 (ED Pa 1969). In the case at bar, the investigators had been authorized, upon probable cause, to search for various illegal drugs including LSD and mescaline. These two drugs are sometimes in liquid form and, when they are, may be instantly destroyed by exposure to foreign substances. The record shows that immediately before entry the investigators near the accused's room were signaled by Pfaff, who had just emerged, that the illegal sale had been completed. With this knowledge of an offense committed virtually in their presence, and cognizant that some forms of the prohibited drugs they were seeking could quickly and easily be destroyed, the investigators made their unannounced entry. In this setting, the method of

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[2] The validity of an entry by civil officers to effect an arrest without a warrant "must be tested by criteria identical with those embodied in 18 U.S.C. §3109." Miller v. United States, 357 US 301, 306 (1958).

entry was not unreasonable. Ker v. State of California, supra; United States v. Burruss, supra; State v. Smith, 37 NJ 481, 181 A2d 761 (1962); see People v. Maddox, 46 Cal2d 301, 294 P2d 6 (1956).

Counsel next contends the military judge erred in denying his motion to litigate the issue of entrapment in Article 39(a) session before the military judge alone. In his argument on the motion, counsel stated the defense would not dispute the testimony of the prosecution's witnesses and wanted the military judge to consider the question as a pure matter of law. Counsel urged this consideration by the military judge alone because "[t]he defense of entrapment places the state of mind and predisposition of the accused in issue . . . This opens the door for evidence of other criminal activities and the general reputation of the accused to be brought before the members of the court." To require the accused to litigate the issue in open court might "severely prejudice [him] in the eyes of the court members." Counsel also stated in his argument that he did not necessarily intend to restrict the issue to the Article 39(a) session. If the military judge determined the accused was not entrapped, the defense might present evidence on the question to the military jury.

Entrapment is a defense which usually presents questions of fact for resolution. See Manual for Courts-Martial, supra, paragraph 216*e;* Masciale v. United States, 356 US 386 (1958), pet. for rehearing denied, 357 US 933 (1958); Zamora-Yescas v. United States, 423 F2d 509 (9th Cir 1970); and Enciso v. United States, 370 F2d 749 (9th Cir 1967). In particular circumstances, however, the issue may properly be disposed of as a matter of law. See United States v. Fenstermaker, 17 USCMA 578, 38 CMR 376 (1968); United States v. McGlenn, 8 USCMA 286, 24 CMR

96 (1957). While such disposition may be indicated once the facts are aired, we perceive no requirement for the military judge to treat the question as a matter of law from the outset. See United States v. Freed, 401 US 601 (1971). Certainly the military judge in this case was justified in viewing counsel's representation that the facts were undisputed as less than compelling in light of his further assertion that the matter might yet be litigated in open court. Nor do we agree that the accused would have been prejudiced by an open court presentation of the entrapment issue. Indeed, counsel's arguments in support of the claim are precisely those rejected by a majority of the United States Supreme Court in Sorrells v. United States, 287 US 435 (1932); see also Osborn v. United States, 385 US 323 (1966); Sherman v. United States, 356 US 369 (1958); Pulido v. United States, 425 F2d 1391 (9th Cir 1970). The disadvantage counsel sees underlies the very nature of the entrapment defense. Sorrells v. United States, supra. Thus, we find no error here.

Trial defense counsel urges two additional errors. In one, counsel argues that the specifications of Charge I do not state offenses and in the other he claims the misstatements of trial counsel in the argument on findings, and his display of irrelevant evidence, prejudiced the accused's rights to a fair trial. These assertions were considered in the review of the Staff Judge Advocate and determined to be without merit. We agree.

Further, appellate defense counsel contend that the findings of guilty of Charge I and its specification are incorrect in law for the same reasons urged in United States v. Bryant, No. 20874 (recon), —— CMR —— (AF CMR 3 Aug 1971). We held contrary to the defense in that case and that holding is dispositive here.

One final matter bears comment. A substantial sentence was imposed in this case and we have carefully examined the record to determine its appropriateness. Unmistakably, the accused was no modest user of drugs. Rather, he dealt in large quantities of very dangerous drugs. Many lives could have been destroyed. We are certain the sentence is entirely appropriate for this grievous misconduct.

The findings of guilty and the sentence are

AFFIRMED.

AMERY, *Chief Judge*, LETARTE, *Senior Judge*, HALICKI and CHOVANEC, *Judges*, concur.

[SEAL]

OFFICIAL

JEAN E. SIMPSON, Colonel, USAF
Chief Commissioner

Manual for Courts-Martial, ¶152

152. Certain Illegally Obtained Evidence. Evidence is inadmissible against the accused:

If it was obtained as a result of an unlawful search of the person or property of the accused conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity; or

If it was obtained without the freely given consent of the accused as a result of an *unlawful search* of another's premises on which the accused was legitimately present, and the search in question was conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity; or

If it was obtained as a result of a seizure or examination of property of the accused upon an *unlawful search* of anyone's property, unless the presence of the property of the accused was due to trespass, whether or not the accused was present, and the search in question was conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity.

Evidence obtained as a result of information supplied by illegal acts of the kinds mentioned above is itself considered as having been obtained as a result of the illegal acts. For example, if a search is unlawful because con-

ducted without probable cause and a second search is conducted based on information supplying probable cause discovered during the first search, evidence obtained by the second search is inadmissible against an accused entitled to object to the evidence even if the second search would otherwise be lawful. Evidence is not considered as having been obtained as a result of the illegal acts merely because it would not have come to light but for those acts. Evidence is considered as having been obtained as a result of the illegal acts only if it has been acquired by an exploitation of those acts instead of by means sufficiently distinguishable to be purged of the taint of the illegality.

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The following searches are among those which are lawful:

A search conducted in accordance with the authority granted by a lawful search warrant.

A search conducted as an incident of lawfully apprehending a person, which may include a search of his person, of the clothing he is wearing, and of property which, at the time of apprehension, is in his immediate possession or control, and a search of the place where the apprehension is made; but a search which involves an intrusion into his body, as by taking a sample of his blood for chemical analysis, may be conducted under this rule only when there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable. See the example of an unreasonable method in the last paragraph of 150*b*.

A search incident to a lawful hot pursuit of a person, including, when so incident, a search reasonably necessary to prevent his resistance or escape.

A search of open fields or woodlands, with or without the consent of the owner or tenant.

A search under circumstances demanding immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods.

A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right to immunity from an unreasonable search, such as an owner, bailee, tenant, or occupant as the case may be under the circumstances.

A search of any of the following three kinds which has been authorized upon probable cause by a commanding officer, including an officer in charge, having control over the place where the property or person searched is situated or found or, if that place is not under military control, having control over persons subject to military law or the law of war in that place:

(1) A search of property owned, used, or occupied by, or in the possession of, a person subject to military law or the law of war, the property being situated in a military installation, encampment, or vessel or some other place under military control or situated in occupied territory or a foreign country.

(2) A search of the person of anyone subject to military law or the law of war who is found in any such place, territory, or country.

(3) A search of military property of the United States, or of property of nonappropriated fund activities of an armed force of the United States.

The commanding officer may delegate to persons of his command, or made available to him, the general

authority to order searches upon probable cause, and a search ordered by virtue of any such delegation is to be considered as having been authorized by the commanding officer. Any such delegation should be made to an impartial person. The person who orders a search need not himself make or be present at the search.

The examples of lawful searches set forth above are not intended to indicate a limitation upon the legality of searches otherwise reasonable under the circumstances.

To be lawful even under circumstances that would permit a lawful search, searches by United States or other domestic authorities of a person's house, dwelling, automobile, effects, papers, or person without his freely given consent must be for instrumentalities or fruits of crime, things which might be used to resist apprehension or to escape, property the possession of which is itself a crime, or evidence which there is reason to believe will otherwise aid in a particular apprehension or conviction. This restriction does not apply to administrative inspections or inventories conducted in accordance with law, regulation, or custom.

Probable cause for ordering a search exists when there is reason to believe that items of the kind indicated above as being properly the subject of a search are located in the place or on the person to be searched. Such a reasonable belief may be based on information which the authority requesting permission to search has received from another if the authority ordering the search has been apprised of some of the underlying circumstances from which the informant concluded that the items in question were where he claimed they were and some of the underlying circumstances from which the authority requesting permission to search concluded that the informant, whose identity need not be disclosed, was credible or his information reliable.

When the accused objects to evidence obtained as a result of a search on the ground that the search was unlawful, the burden is on the Government to show, as an interlocutory matter, either that the search was lawful or that for some other reason the search would not render the evidence in question inadmissible against the accused. If the justification for using evidence obtained as a result of a search is that there was a freely given consent to the search, that consent must be shown by clear and positive evidence.

Military courts have no authority to entertain a motion for or to order the return of property obtained as a result of an unlawful search or seizure or to entertain a motion for or to order the suppression for use as evidence of property or information so obtained, as distinguished from ruling as to whether or not it is admissible against the accused.

Evidence is inadmissible against the accused if it was obtained under such circumstances and in such a place that Section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. § 605), pertaining to the unauthorized interception and divulgence of communications by wire or radio, would prohibit its use against the accused if he were being tried in a United States district court. Section 605 of the Communications Act does not apply to communications over a self-contained military communications system, nor does it apply to communications over an unlicensed, private communications system.

See also 140*a* and the last paragraph of 150*b*.

AUTHORITY TO SEARCH AND SEIZE

JOHN P. MOULTON, Special Agent, OSI

has informed me that he is investigating the offense of Sale and Possession of Illegal Drugs,

by Amn STAN WALLIS, 10th TRS, MHAFB, ID and has requested that

I authorize a search of the (person) of STAN ALLEN WALLIS, AMN, FR 549-62-6524 and other individuals located in Room 218, Barracks 2425, Mountain Home AFB, Idaho and (premises known as Room 218, Barracks 2425, MHAFB, ID)

and the seizure of the following specified property: Illegal Drugs (including mescaline, LSD, THC, and marijuana) as well as paraphernalia commonly associated with the use of illegal drugs, and written matter relating to drug abuse.

Having carefully considered the matters presented to me in support of that request, I am satisfied that there is probable cause to believe that the property specified above is being concealed on the (person) (premises) described. I am further satisfied from the matters presented that the said property:

(1) ☐ Is or has been used, designed, or intended for use, as the means of committing the criminal offense being investigated.

(2) ☐ Was illegally obtained as the results of the commission of the offense being investigated.

(3) ☒ Is contraband possessed or controlled in violation of Article 134, UCMJ

Accordingly, Special Agent SCHULZ, with the assistance of such person or persons as may be necessary, is directed to search forthwith the (person) (premises) described for the property specified, and if such property be found to seize and secure the same for use as evidence in any criminal prosecution hereafter initiated. This authority to search and seize is issued by virtue of:

☒ My position as commander having jurisdiction over the (person) (premises) herein described.

☐ The delegation to me of the authority to authorize searches and seizures by the commander having jurisdiction over the (person) (premises) herein described.

No search conducted pursuant to the authority herein granted shall be initiated later than three days from the date hereof.

Dated this 23rd day of November, 19 70, at Mountain Home AFB, Idaho

TYPED NAME, GRADE, AND ORGANIZATION OF AUTHORIZING OFFICIAL	SIGNATURE
W.E.Y. PAXTON, Colonel, USAF COMMANDER	

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